Book Launch

Dynamic and Principled: The Influence of Sir Anthony Mason, Barbara McDonald, Ben Chen and Jeffrey Gordon (eds), Federation Press, 2022, 464 pp, ISBN 9781760023454

The publication and launch of this book have been timed to occur in the year that marks the 50th anniversary of the appointment of Sir Anthony Mason as a Justice of the High Court of Australia.

I commence by hailing the presence this evening of Sir Anthony Mason himself: 50 years after his appointment as a Justice of the High Court, 53 years after his appointment as a Judge of the Court of Appeal of the Supreme Court of New South Wales, 58 years after his appointment as Solicitor-General of the Commonwealth, and 71 years after his admission to the New South Wales Bar. There are other milestones in his extraordinary career which I will mention. That will do for a start.

This is the only time in our long relationship when I have found myself on the Bench with Sir Anthony sitting at the Bar table. His appearance is made all the more formidable by the impressive array of juniors he has assembled to either side of him.

With the authority temporarily afforded by our relative positions, I am tempted to say 'Mr Mason, do you move?'

What I will say, unprompted by any motion and presuming to speak on behalf of the hundreds of admirers who have joined this event physically and virtually, is: Sir Anthony, thank you for your honouring all of us with your presence. Thank you for your service to Australian law and Australian legal institutions. Thank you for your contribution through that service to our national development. But for you, the book we have come to launch would have no hero. But for you, our national story over the last half century would have had a different plot.

Though there might seem something odd about launching one book by talking about two other books, that is what I am going to do. The other two books help to put this book in context. I am not alone in thinking that. The editors of this book, Barbara MacDonald, Ben Chen and Jeffrey Gordon, make reference to both of the other books in their engaging introduction.

The most recent of those other two books was published by Cambridge University Press just last year. It is a collection of essays entitled *Towering Judges: A Comparative Study of Constitutional Judges*.[1] The essays examine the work of 19 judges of apex and constitutional courts in 14 national jurisdictions. The judges who are presented as 'towering judges' are identified on the basis of having stood out from other judges of the courts of which they were members and having had a unique impact on the trajectory of constitutional doctrine within their respective jurisdictions. Australia's Sir Anthony Mason is amongst them, alongside Israel's Aharon Barak and South Africa's Arthur Chaskalson.

1 Rehan Abeyratne and Iddo Porat (eds), *Towering Judges: A Comparative Study of Constitutional Judges* (Cambridge University Press, 2021).

One essay in the collection by veteran Harvard Law Professor Mark Tushnet,[2] is a sustained examination of the phenomenon of the towering judge. The essay makes three main points. The first point is that to refer to a towering judge is to refer to the standing of that judge in relation to other judges; some judges do tower over other judges; and most judges who are seen to tower over other judges do so for the basic and unsurprising reason that they are seen to be much the better lawyers and to have much the better judgment. The second point is that 'toweringness' is historically contingent; the conditions that allow for or support a judge to be recognised as towering over other judges vary through time. The third point is that perceptions of toweringness themselves can vary through time; like wines, the judgments and reputations of some judges age better than the judgments and reputations of some others.

During its 119-year history, the High Court of Australia has had 55 judges. Nearly all have been adequate. Some have been outstanding. Just two have been generally considered towering. The other was indisputably Sir Owen Dixon, who served on the Court as a Justice and then as Chief Justice for a total of 35 years, more than half again longer than Sir Anthony's period of service on the Court as a Justice and subsequently as Chief Justice which spanned a total of 22 years.

Unsurprisingly, several of the contributions to the book we have come to launch involve an element of comparison and contrasting of the judicial contributions and judicial methods of those two towering figures. The judicial method of Sir Owen Dixon will be forever tied to the label of 'strict and complete legalism' — a label he chose for himself at the time of being sworn in as Chief Justice. The label has come to mean different things to different people and is unfortunately too easily equated with formalism, which it never really was.

The judicial method of Sir Anthony Mason defies labelling. He has never sought to ascribe one to himself, although at the time of his own swearing in as Chief Justice he made a point of speaking of courts having an obligation to shape legal principles to the conditions of Australian society. He spoke of the need to ensure that judicial development of Australian law responded 'dynamically' to conditions of Australian society. He spoke of the need to ensure that that judicial development is 'principled, orderly and evolutionary in character'.[3]

Geoff Lindell has observed of Sir Anthony's extra-judicial writings more generally that he seems to have been keen to emphasise the inevitability of change in the development of all major areas of the law and to have had as his concern to explore not whether, but how, the law (especially judge-made law) should respond to that change.[4]

Sean Brennan, whose contribution to the book we have come to launch Sir Anthony singles out in his foreword for special mention, refers to the

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2 Mark Tushnet, 'The Landscape that Towering Judges Tower Over' in Rehan Abeyratne and Iddo Porat (eds), *Towering Judges: A Comparative Study of Constitutional Judges* (Cambridge University Press, 2021) ch 2, 40.

3 *Mason, Swearing in as Chief Justice of the High Court, 6 February 1987* (1986) 162 CLR ix-xi.

4 Geoffrey Lindell (ed), *Sir Anthony Mason: The Mason Papers* (Federation Press, 2007) 2–3.

Mason judicial method in terms of 'realism'. Theunis Roux and Rosalind Dixon refer to it in terms of 'functionalism'. Mark Leeming describes it as 'principled development'. Stephen McLeish describes it as involving a preparedness to accept that the law can change over time coupled with a keen respect for the role of precedent. Peter Gerangelos describes it as involving serious engagement with competing perspectives and a balancing of competing interests. The editors have sought to capture it in the title 'dynamic and principled', an epithet which Andrew Bell embraces.

What would have happened, I found myself asking as I pondered those and similar descriptions in the book, had Dixonian legalism and Masonic realism or functionalism or principled dynamism ever come into contact? Hang on a minute, I found myself answering, there is no need to treat this as a thought experiment. Dixonian legal method did in fact come into contact with Masonic legal method during the period of a decade or so when Dixon CJ presided over the High Court and when a young Mr Mason appeared as an increasingly popular junior counsel.

Remember the case of The Queen against Davison,[5] I found myself saying to myself. There the 29-year-old Mason, barely 3 years at the Bar, appeared unled for the putatively bankrupt Davison before the Full Court of the High Court with Dixon presiding. On the other side was Mr MacFarlan QC leading Mr Reynolds for the Attorney-General of the Commonwealth. You will see how the encounter went in the transcript. So, I called for the transcript.

This is how it went:

Dixon CJ:	Who begins?
Mr Mason:	I would submit that as the applicant I begin. Perhaps I might say at this stage that it would appear to me that the matter is wrongly entitled.
Dixon CJ:	What should it be entitled?
Mr Mason:	I would suggest that it should be entitled Davison against The Queen, seeing that in fact it is the hearing of the case, although in the Bankruptcy Court it was correctly styled The Queen against Davison.
Dixon CJ:	Well, without going into [what] the title should be, are you quite content?
Mr MacFarlan:	Yes, your Honour, I am quite content.

And so, Mr Mason began. When he had finished, he had failed to persuade the Chief Justice or any other member of the Court that The Queen against Davison should have been entitled Davison against The Queen. He had succeeded in persuading the Chief Justice and four other members of the Court that the sequestration order against his client was invalid because it had been made by a non-judicial officer in the purported exercise of judicial power.

5 *R v Davison* (1954) 90 CLR 353.

The sophisticated judgment of which Dixon CJ is shown in the Commonwealth Law Reports as a joint author, and of which he was without doubt the principal if not sole author, can be seen from a study of the transcript to have tracked closely the subtle argument of Mr Mason. There was a meeting of minds. There was an amalgam of methods. The result was a novel and principled exposition of constitutional doctrine which has stood the test of time. The Queen against Davison remains a leading authority on the nature of judicial power.

The difference between the two legal methods is real but, in the broad sweep of history, appears much less stark than it may have appeared at an earlier time. Harking back to Tushnet, much of the apparent difference in methodology can be explained in terms of exceptionally good lawyers making exceptionally sound judgments in different institutional settings and in different social and political circumstances.

That brings me to the second of the two other books. It was published by Federation Press in 1996 as a collection of essays based on presentations made at a conference called *The Mason Court and Beyond* held at the University of Melbourne soon after Sir Anthony's retirement following 8 years in the office of Chief Justice of the High Court. I mention that book for two reasons. One is to highlight the significance of its title. The other is to note something said in the contribution by Sir Gerard Brennan who had very much been part of the 'Mason Court' and who was the immediate successor to Sir Anthony in the office of Chief Justice.

The title of the book is *Courts of Final Jurisdiction: The Mason Court in Australia*.[6] The title was well chosen to capture the essence of what had occurred during the period of what was referred to in the book as the 'Mason Court'. As Sir Anthony stressed on being sworn in as Chief Justice, elimination of appeals to the Privy Council just the year before meant that for the first time in its history the High Court had the exclusive final responsibility for declaring what is the law in Australia. The buck had finally stopped here.

No clearer example of the effect of that change in circumstances on permissible and appropriate judicial technique can be seen than in the context of s 92 of the *Constitution* by contrasting the earlier judgment of Sir Owen Dixon in *Hughes and Vale Pty Ltd v New South Wales* ('*Hughes and Vale*')[7] with the unanimous judgment of the High Court led by Sir Anthony Mason during his first year as Chief Justice in *Cole v Whitfield* ('*Cole*').[8] The Dixon single judgment in *Hughes and Vale* was a masterfully crafted piece of individual reasoning able to be read as being faithful to precedent whilst at the same time highlighting its flaws, written in the expectation that it would be overruled on appeal to the Privy Council, as in fact it came to be.[9] The Mason joint judgment in *Cole* was a robust wholesale reappraisal of the entirety of the prior case law confidently and authoritatively cast in terms of 'we' decide!

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6 Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996).

7 (1953) 87 CLR 49.

8 (1988) 165 CLR 360.

9 *Hughes and Vale Pty Ltd v New South Wales [No 1]* (1954) 93 CLR 1.

The contribution of Sir Gerard Brennan to that earlier book was entitled 'A Tribute to Sir Anthony Mason'.[10] Sir Gerard described Sir Anthony as combining a deep knowledge of the past with a vision of the future, which made him uniquely qualified to have led the Australian judiciary during a period which was inevitably to be one of change. Borrowing from Harlan Fiske Stone's tribute to Benjamin Cardozo, the new Chief Justice said of his predecessor that '[h]e saw in the judicial function the opportunity to practise that creative art by which law is moulded to fulfil the needs of a changing social order'.

Underappreciated in Australia has been the impact which Sir Anthony went on to have after his retirement from the High Court as an inaugural Non-Permanent Judge of the Hong Kong Court of Final Appeal, as a friend and confidant of successive Chief Justices Andrew Li and Geoffrey Ma and as a sage guide and steady hand brought in to deal with the highest profile and most delicate cases. Bill Gummow's unique contribution to this book goes a long way towards explaining the enormity of Sir Anthony's influence in that role. Nowhere was that influence better summarised than in the official citation for Hong Kong's highest honour, the Grand Bauhinia Medal or 'GBM', which Sir Anthony received in 2013 and of which he is justifiably proud. The citation described him as 'a pillar of the court' who had made immense contributions in establishing the reputation of the court in the common law world.[11]

After 18 years as a Non-Permanent Judge of the Court of Final Appeal, nearly as long as his period as a Justice and Chief Justice of the High Court, Sir Anthony made the choice to end that second judicial career. He announced his retirement shortly before his 90th birthday, just shy of the age at which Oliver Wendell Holmes retired from the Supreme Court of the United States.

He retired from judicial life having shepherded into existence not one court of final jurisdiction, but two.

Turning to the book at hand, there is much to be praised in the individual contributions. They are too numerous to be referred to individually. Twenty-three separate topics are covered by 29 authors. With his usual enthusiasm, John Carter doubled up as a co-author on two distinct contracts topics, so the number could be said to be 30. Daniel Farinha is acknowledged as a research assistant in a footnote in an early chapter and then appears again as a co-author of a later chapter, showing him to be a very enterprising junior counsel.

My mentioning of John (the late career academic with specialised interests who has never been noted for being reticent about criticising judgments with which he disagrees) together with Daniel (the early career barrister eager to do a range of work) is not gratuitous or personal. It is meant to highlight an admirable choice made by the editors to limit the number of members and former members of the judiciary invited to make contributions to the book, any number of whom would have relished the opportunity to pay respect to

10 Sir Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 10, 14.

11 '2013 Honours List', *Press Releases* (Web Page, 1 July 2013) <https://www.info.gov.hk/gia/general/201307/01/P201306300691.htm>.

Sir Anthony. The editors have chosen instead to engage authors who span the academy and the profession and who span multiple generations. The book is richer for it. So too is the book's project of celebrating and perpetuating the legacy of one of our two greatest jurists.

Expressing sincere appreciation to all of those involved, it is my pleasure and privilege to launch *Dynamic and Principled: The Influence of Sir Anthony Mason*.

Stephen Gageler
Justice of the High Court of Australia

This is a lightly edited version of remarks made at the book launch in the Banco Court in the Supreme Court of New South Wales at Queens Square in Sydney on Wednesday 6 July 2022. Justice Gageler spoke from the bench. Sir Anthony Mason was in attendance, seated at the bar table. Seated near him at the bar table were Chief Justice Bell of the Supreme Court of New South Wales and Justices McLeish and Walker of the Court of Appeal of the Supreme Court of Victoria, all of whom, like Justice Gageler, were formerly associates to Sir Anthony.